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FAIRCHILD (TAIWAN) CORPORATION

8
9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 POWER INTEGRATIONS, INC.,
a Delaware corporation,

14 *Plaintiff,*

15 v.

16 FAIRCHILD SEMICONDUCTOR
INTERNATIONAL, INC., a Delaware
17 corporation, FAIRCHILD SEMICONDUCTOR
CORPORATION, a Delaware corporation, and
18 FAIRCHILD (TAIWAN) CORPORATION, a
Taiwanese corporation,

19 *Defendants.*

20 Case No. 09-cv-05235- MMC

21 **FAIRCHILD'S REPLY IN SUPPORT OF
MOTION TO STAY PENDING U.S.
SUPREME COURT DECISION IN *DEX
MEDIA, INC. v. CLICK-TO-CALL*
(No. 18-916)**

22 Date: September 6, 2019

23 Time: 9:00 a.m.

24 Courtroom: 7, 19th Floor

25 Honorable Maxine Chesney

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1 **I. INTRODUCTION**

2 Power Integrations' response leads with two misrepresentations that, when corrected,
 3 undercut its argument. First, Power Integrations writes that the "IPRs have now been resolved in
 4 PI's favor by the Federal Circuit." (Resp. at 1.) This is misleading. The IPRs were resolved by
 5 the PTAB in ON Semiconductor's favor, with the Federal Circuit reversing on procedural
 6 grounds—grounds the Supreme Court is poised to reverse. Contrary to what Power Integrations
 7 would have this Court believe, the landscape has changed dramatically since 2016: under the
 8 PTAB's substantive analysis, an analysis not addressed by the Federal Circuit, the '079 and '908
 9 would be dead.

10 Second, Power Integrations writes that the possibility that a pending Supreme Court case
 11 might change the law is "something that the Ninth Circuit has repeatedly said is *not* an adequate
 12 basis for a stay." (*Id.* (emphasis in original).) Not true. In *Cuadras v. Metropcs Wireless, Inc.*, to
 13 give but one example, the Central District's Judge Snyder cited *two* Ninth Circuit cases and *four*
 14 California federal district court cases granting *Landis* stays¹ pending the Supreme Court's
 15 decision in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3222 (May 24, 2010). No. CV 09-
 16 7897-CAS (AJWx), 2011 WL 227591, at *1–2 (C.D. Cal. Jan 21, 2011). There are many more
 17 examples: Issuing stays when the Supreme Court grants cert is, it turns out, rather common.²

18 ¹ As described in Fairchild's opening brief (at 5 *et seq.*), *Landis* stays are stays granted pursuant
 19 to *Landis v. North American Co.*, 299 U.S. 248 (1936), in response to potential changes in the law
 20 arising from another action.

21 ² **Ninth Circuit.** E.g., *Ganezer v. DirectBuy, Inc.*, 571 F.3d 846 (9th Cir 2009) (stay pending
 22 Supreme Court decision in *Hertz Corp. v. Friend*); *Means v. Navajo Nation*, 432 F.3d 924, 924
 23 n.* (9th Cir. 2005) ("[w]e withdrew submission of this case when the Supreme Court granted
 24 certiorari in *United States v. Lara*"); *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001)
 25 ("we granted the Committee's request to stay the appeal pending the Supreme Court's decision
 26 in *Board of Trustees of the University of Alabama v. Garrett*"); *McCarthy v. Apfel*, 221 F.3d
 27 1119, 1122 n.3 (9th Cir. 2000) ("In *Forney v. Chater*, we held that a remand pursuant to the
 28 Social Security Act is not appealable. After the Supreme Court granted certiorari in that case, the
 29 Commissioner obtained a stay of proceedings of the present case pending a decision by the
 30 Supreme Court in *Forney*."); *Polykoff v. Collins*, 816 F.2d 1326, 1330 (9th Cir. 1987) ("[T]his
 31 court granted appellants' motion to stay the appeal pending the Supreme Court's decision in
 32 *Brockett v. Spokane Arcades, Inc.*").

33 **Other Circuits.** E.g., *Anker v. Wesley*, 670 F. Supp. 2d 339, 341 (D. Del. 2009) (stayed after
 34 Supreme Court grant of certiorari in relevant case); *Houlihan v. Sussex Tech. Sch. Dist.*, 461 F.
 35 Supp. 2d 252, 255 (D. Del. 2006) (same); *OdNeal v. Dretke*, 435 F. Supp. 2d 608, 611 (S.D. Tex.
 36 2006), *rev'd in part on other grounds*, 324 F. App'x 297 (5th Cir. 2009) (same); *Michael v. Ghee*,

1 Power Integrations' misreading of one footnote in one habeas case, *Yong v. INS*, does not change
 2 that.

3 When these misrepresentations are corrected, Power Integrations' response unravels. As
 4 Power Integrations notes, statistics show a *greater than 70%* chance that the Supreme Court will
 5 reverse *WiFi-One v. Broadcom*. (Resp. at 7; D.I. 1089-2 at 5.) While impossible to predict, of
 6 course, chances here are even higher since the Federal Circuit, in a fractured opinion, interpreted
 7 "final and nonappealable" in 35 U.S.C. § 314(d) to mean "nonfinal and appealable." Just last
 8 year, the Supreme Court reversed the Federal Circuit's interpretation of the same IPR statute,
 9 finding that the Federal Circuit has failed to read the "the plain text of [the statute]." *SAS Inst.*
 10 *Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018).

11 The damages retrial has yet to start; a stay is likely to dispose of trial altogether,
 12 simplifying the issues; and any harm that Power Integrations might suffer—there is none—is of
 13 its own making. This Court should grant a stay.

14 **II. ARGUMENT**

15 **A. Power Integrations Applies The Wrong Standard**

16 Power Integrations applies the wrong standard. Contrary to Power Integrations' claim,
 17 this is *not* a stay pending a PTO validity challenge. (Resp. at 1–3, *passim*.) The PTO has already
 18 spoken. Therefore *Telemac*, which expressly governs stays "pending the conclusion of a PTO
 19 examination [or IPR]" is inapposite because the PTO action has already concluded. *Telemac*
 20 *Corp. v. Teledigital, Inc.*, 450 F. Supp. 2d 1107, 1110–1111 (N.D. Cal. 2006); *Universal Elecs.*,
 21 *Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1030 (C.D. Cal. 2013) (same
 22 standard for IPRs). Rather, as Power Integrations acknowledges but then largely ignores, *Telemac*
 23 does not apply—*Landis* does.

24 But because Power Integrations believes that its case is stronger under *Telemac*, it forges
 25 ahead with the *Telemac* standard (at 3–10) and attempts to reargue the 2016 motion to stay (at 1,

26 325 F. Supp. 2d 829, 831–33 (N.D. Ohio 2004) (same); *Johns v. Evergreen Presbyterian*
 27 *Ministries, Inc.*, 826 F. Supp. 1050, 1051 (E.D. Tex. 1993) ("the interests of justice, judicial
 28 economy and plain prudence compel the Court to stay this case until the Supreme Court renders
 its ruling in *Landgraf* [v. *USI Film Prods.*]"); *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp.
 1555, 1557 (M.D. Fla. 1987).

1 3–4)—going so far as to take issue with cases Fairchild cited in its 2016 motion *but not* in the
 2 instant motion (at 4 (“each of the cases cited [in 2016] involved very early stage litigation”)).
 3 Power Integrations’ straw-man arguments should be rejected.

4 While Fairchild believes Power Integrations waived its position by failing to address
 5 Fairchild’s arguments and the *Landis* standard, *see, e.g., Zaklit v. Glob. Linguist Sols., LLC*, No.
 6 CV 13-8654 MMM (MANx), 2014 WL 12521725, at *13 (C.D. Cal. Mar. 24, 2014) (failure of
 7 party in opposition brief to address argument waives issue), a stay is also appropriate under
 8 *Telemac*—which, Power Integrations neglects to mention, notes this district’s “liberal policy in
 9 favor of granting motions to stay proceedings pending the outcome” PTO proceedings. *Telemac*,
 10 450 F. Supp. 2d at 1111 (citation omitted).

11 **B. A Stay Is Appropriate Under *Telemac***

12 **1. This Not A “Very Late Stage” Case**

13 Power Integrations portrays this case as nearly over. (Resp. at 4–5.) But the damages
 14 retrial has yet to start; and because Power Integrations announced at the August 16th CMC that it
 15 intends to present a new damages theory—as it must, having overreached twice before—this case
 16 cannot go to trial without, at the very least, damages contentions, targeted fact discovery, and
 17 expert discovery. None of this has happened, and no trial date has been set.

18 Thus, contrary to what Power Integrations argues, the answer to *Telemac* factor one—
 19 “whether discovery is complete and whether a trial date has been set”—is a resounding “no.”
 20 *Telemac* 450 F. Supp. 2d at 1111. That alone distinguishes this case not only from *Telemac*,
 21 where discovery was well under way and a trial date had been set, *id.*, but from the other cases
 22 Power Integrations cites. *Universal Elecs.*, 943 F. Supp. 2d at 1031 (discovery served and trial
 23 date set); *Interwoven, Inc. v. Vertical Comput. Sys., Inc.*, No. C 10-04645 RS, 2012 WL 761692,
 24 at *4 (N.D. Cal. Mar. 8, 2012) (“[d]iscovery is well underway”); *Comcast Cable Commc’ns*
 25 *Corp., LLC v. Finisar Corp.*, No. C 06-04206 WHA, 2007 WL 1052883, at *2 (N.D. Cal. April 5,
 26 2007) (noting “large investment in preparation to produce a mass of documents, most of which
 27 work would have to be reduplicated later were a stay now granted.”).

28

1 Power Integrations' response pegs the propriety of a stay to claim construction (Resp. at
 2 4–5), as if the rule were “no stays after *Markman*.” That, of course, is not the rule. *See, e.g.*,
 3 *Finjan, Inc. v. Symantec Corp.*, 139 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (granting motion to
 4 stay after claim construction hearing). And while Power Integrations faults Fairchild for citing to
 5 no case quite like this one (Resp. at 4–5, *passim*), neither has Power Integrations. No wonder:
 6 this case is *sui generis*—damages have been litigated (and overturned) twice, the PTAB
 7 invalidated all asserted claims, and the Supreme Court is about to rule on a case, *Dex Media*, that
 8 could dispose of this action entirely.

9 In any event, the “[c]ourt must decide stay requests on a case-by-case basis.” *TPK Touch*
 10 *Sols., Inc. v. Wintek Electro-Optics Corp.*, No. 13-cv-2218-JST, 2013 WL 6021324, at *1 (N.D.
 11 Cal. Nov. 13, 2013). And the procedural posture of *this* case—a bifurcated trial where only
 12 damages remain—favors a stay.

13 *SynQor v. Artesyn Technologies*, which Power Integrations cites, supports this. The
 14 *SynQor* court, which denied a stay, distinguished *Standard Havens*, which looks like this case and
 15 granted a stay. 2012 U.S. App. LEXIS 1992, at *6 (Fed. Cir. Jan. 31, 2012) (citing *Standard*
 16 *Havens Prods. v. Gencor Indus.*, 996 F.2d 1236 (Fed. Cir. 1993)). In *Standard Havens*, the
 17 Federal Circuit “directed the district court to stay its *damages proceedings* until the PTO
 18 reexaminations proceeding became final. In that case the PTO’s proceedings were complete and
 19 the decision of the [Board of Patent Appeals and Interferences] was on appeal before another
 20 district court.” *Id.* (emphasis added). Likewise here: the PTO’s proceedings are complete, and
 21 the damages retrial should be stayed until the patentability or unpatentability of Power
 22 Integrations’ patents has been finalized.

23 C. A Stay Will More Likely Than Not Simplify The Issues

24 Power Integrations predicts that the Supreme Court will not reverse *WiFi-One*. (Resp. 5–
 25 8.) Power Integrations does not and cannot know what the Supreme Court will do; but what it
 26 *does* know is that the statistics it cites indicate a greater than 70% chance that the Supreme Court
 27 will reverse. (Resp. at 7; D.I. 1089-2 at 5.) It is, in other words, more likely than not that the
 28 PTO’s cancellation of all asserted claims in this case will be reinstated, potentially eliminating the

1 need for a third damages retrial. One could hardly conceive of greater simplification. *See, e.g.,*
 2 *In re Cygnus Telecomm. Tech., LLC, Patent Litig.*, 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005)
 3 (stay is “particularly justified where the outcome of the reexamination would be likely to assist
 4 the court in determining patent validity and, if the claims were cancelled in the reexamination,
 5 would eliminate the need to try the infringement issue.”)

6 In any event, the basis for Power Integrations’ prediction is undermined by its selective
 7 citation of Supreme Court precedent. Although it quotes liberally from *SAS Institute, Inc. v.*
 8 *Iancu and Cuozzo Speed Techs., LLC v. Lee* (*see Resp. at 5–6*), it omits critical language from
 9 those cases that directly supports Fairchild’s position that Section 314(d)’s “final and
 10 nonappealable” bars judicial review. As the Supreme Court noted in *SAS Institute*:

11 Even if the statute forbids his partial institution practice, the
 12 Director suggests we lack the power to say so. By way of support,
 13 he points to § 314(d) and our decision in *Cuozzo*. Section 314(d)
 14 says that the “determination by the Director whether to institute an
 15 inter partes review under this section shall be final and
 16 nonappealable.” In *Cuozzo*, we held that *this provision prevented*
courts from entertaining an argument that the Director erred in
instituting an inter partes review of certain patent claims.

17 *SAS Inst.*, 138 S. Ct. at 1359 (citations omitted, emphasis added).

18 *Dex Media* addresses precisely this, but from a slightly different angle—namely, whether
 19 the statute permits judicial review of the Director’s decision to institute an IPR upon finding that
 20 the time bar does not apply. (*See D.I. 1087-3, Exhibit A.*) Contrary to what Power Integrations
 21 argues, both *SAS Institute* and *Cuozzo* suggest “that the plain text of [the statute] supplies a ready
 22 answer”—*no appeal is allowed*. *SAS*, 138 S. Ct. at 1354.

23 **D. Any Prejudice To Power Integrations—And There Is None—Is Self-
 24 Created**

25 Despite Power Integrations’ efforts to absolve itself (*Resp. at 3–4*), the procedural posture
 26 of this case is a direct result of Power Integration’s prior overreaches on its damages theories.
 27 The Federal Circuit made this crystal clear:

28 Here, the power supply controllers had other valuable features, such
 29 as jittering. . . . In fact, Power Integrations sought infringement
 30 damages from Fairchild on the jittering feature in these same
 31 products in a separate lawsuit based on different patents, and we

affirmed the judgment of infringement. Moreover, many of Fairchild’s technical marketing documents specifically mention the jittering feature and other features in addition to the ’079 patented feature. There is no proof that these features, including jittering, did not affect consumer demand. Without such proof, Power Integrations did not meet its burden to show that the patented feature was the sole driver of consumer demand, i.e., that it alone motivated consumers to buy the accused products.

Power Integrations v. Fairchild Semiconductor, 904 F.3d 965, 979–80 (Fed. Cir. 2018). The prejudice now claimed by Power Integrations, “delayed payment,” is prejudice of its own making. (Resp. at 9.)

In any event, Fairchild stands by its argument that Power Integrations’ decision to forego an injunction undermines its claims of harm. This is not only because at least some cases say so explicitly. *See, e.g., Lockyer v. Mirant Corp.*, 398 F.3d 0198, 1110 (9th Cir. 2005) (non-movant seeking no injunctive or declaratory relief suffers no harm because stay “would result, at worst, in a delay in monetary recovery”); *GT Nexus, Inc. v. Inttra, Inc.*, No. C 11-02145-SBA, 2014 WL 3373088, at *4 n.7 (N.D. Cal. July 9, 2014) (“[A]ttempts by a patentee to argue undue prejudice are undermined if the patentee has elected not to pursue preliminary injunctive relief.”) (quoting *Zillow, Inc. v. Trulia, Inc.*, No. C12-1549 JLR, 2013 WL 5530573, at *21 (W.D. Was. Oct. 7, 2013) (collecting cases)). But also because, as Fairchild noted in 2016, Power Integrations’ decision to forego an injunction in this case was a tactical maneuver to collect damages as quickly as possible lest the PTO invalidate the ’079 and ’908. (D.I. 1012 at 1.) Before the IPRs were filed and instituted, Power Integrations consistently asked this Court for leave to file a permanent injunction (*see, e.g.*, D.I. 956), only to change tack when the PTO instituted IPRs on every asserted claim. Power Integrations is anxious to get paid before the Supreme Court reinstates the PTO’s cancellation of all asserted claims, but that anxiety does not justify moving forward with a *third* damages retrial only to have the Supreme Court undo everything less than twelve months from now.

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1 There was, moreover, nothing tactical about the timing of ON Semiconductor's IPRs. ON
 2 Semiconductor³ filed its IPR on the '079 patent on March 29, 2016, nearly six months before its
 3 merger with Fairchild. It did so because Power Integrations had threatened to bring suit against
 4 ON Semiconductor's own products. As it turned out, ON Semiconductor's apprehension that
 5 Power Integrations might sue for alleged infringement of the '079 patent was not unfounded—
 6 Power Integrations did *exactly* that just a few months later. *See Complaint, Power Integrations v.*
 7 *ON Semiconductor*, Case No. 5:16-cv-06371-BLF (D.I. 1) (filed Nov. 1, 2016). There was no
 8 “undue tactical advantage” in ON Semiconductor’s mounting a good faith defense in view of
 9 Power Integrations’ assertions against ON Semiconductor’s own products, nor has Power
 10 Integrations demonstrated otherwise.

11 Finally, Power Integrations’ position here *is* inconsistent with the position it took in
 12 *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, C.A. No. 04-1372-LPS (D. Del.).
 13 While Power Integrations did not move for a formal “stay,” it asked the Delaware district court to
 14 “stage” the case so that it would not proceed until the Supreme Court ruled. Power Integrations’
 15 proposal—which the Delaware court adopted in full (No. 1:04-cv-01371 (D. Del.), D.I. 966)—
 16 was as follows:

17 Power Integrations therefore suggests the parties provide ten-page
 18 simultaneous opening briefs within two weeks of the Supreme
 19 Court’s ruling, with ten-page simultaneous replies due a week later.
 20 This will allow the Court and the parties to conserve resources and
 21 focus their near-term efforts on their other ongoing litigation, while
 planning to move forward in this case once the Supreme Court has
 clarified the appropriate framework for quantifying the harm in a
 case where domestic infringement has occurred and caused harm
 both inside and outside the U.S.

22 (*Id.* at 2.)

23 If the Court is not inclined to formally stay this case, Fairchild respectfully requests that
 24 the Court adopt the procedure proposed by Power Integrations in the Delaware case. Specifically,
 25

26 ³ Power Integrations’ brief incorrectly states that Fairchild filed “eleventh-hour IPRs.” Fairchild
 27 did not file the IPRs in question, ON Semiconductor did, and did so before its merger with
 28 Fairchild. Moreover, Power Integrations’ assertion that Fairchild “then joined these IPRs as an
 admitted ‘real party in interest’ is false, and Power Integrations provides no citation—because it
 cannot—in support of its assertion that Fairchild “joined” any of ON’s IPRs.

1 Fairchild proposes that the Court order the parties to submit a joint status statement and proposal
2 "within two weeks of the Supreme Court's ruling" in *Dex Media* concerning the impact of the
3 Supreme Court's decision on the present proceedings.

4 **III. CONCLUSION**

5 For the foregoing reasons, the Court should stay this case pending the Supreme Court's
6 *Dex Media* decision.

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Dated: August 22, 2019

MORRISON & FOERSTER LLP

By: /s/ Colette Reiner Mayer

COLETTE REINER MAYER

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